

M. J. HARVEY, JR.

IBLA 75-137

Decided March 25, 1975

Appeal from the July 30, 1974, decision of the Eastern States Office, Bureau of Land Management, denying petition for reinstatement of oil and gas lease ES 12187 (Miss).

Affirmed.

1. Oil and Gas Leases: Termination

Oil and gas leases terminate by operation of law if the annual rental payment is not actually received in the proper office by the close of the business day.

2. Oil and Gas Leases: Reinstatement -- Words and Phrases

Reasonable diligence in sending a rental payment due on the anniversary date includes transmitting the payment so that it will normally be received in the appropriate office on the anniversary date considering the method of transmission, normal delays in handling, and the distance involved.

3. Oil and Gas Leases: Reinstatement -- Words and Phrases

Failure to pay advance rentals on or before the anniversary date may be justifiable only if the reason for such failure is proximate in time to the anniversary date and may reasonably be considered to be the proximate cause of the failure to submit the payment on time.

4. Oil and Gas Leases: Reinstatement -- Rules of Practice: Appeals: Burden of Proof

The burden of proving that failure to pay advance rentals on or before the anniversary date was either justifiable or not due to a lack of reasonable diligence is the obligation of the one who failed to make timely payment.

APPEARANCES: M. J. Harvey, Jr., pro se.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

M. J. Harvey, Jr., has appealed from the July 30, 1974, decision of the Eastern States Office, Bureau of Land Management (BLM), which denied his petition to reinstate oil and gas lease ES 12187 (Miss.) which had expired by operation of law for failure to pay the advance rental on or before the anniversary date as provided in 30 U.S.C. § 188(b) (1970) and 43 CFR 3108.2-1(a). Both the statute and regulation provide that if the anniversary date falls on a day when the appropriate BLM office is closed, the payment may be considered timely if it is received on the next working day. The anniversary date of appellant's lease fell on Saturday, June 1, 1974. The next working day was Monday, June 3, 1974. Appellant sent the payment by telegram on Monday, June 3, 1974, but it was not recorded as received in the BLM office until 10:00 a.m., Tuesday, June 4, 1974. Therefore, the lease terminated by operation of law. 30 U.S.C. § 188(b) and 43 CFR 3108.2-1(a).

[1] Appellant asserts that the lease should not have been terminated since the money was received by Western Union on June 3 and since Western Union probably notified the BLM office by telephone that the money was available, even though it was not delivered until the next day, June 4. However, the facts are somewhat different. An employee of Western Union advises that the appellant sent the money order from the Dallas, Texas, telegraph office at 1:05 p.m. central time, which was 2:05 eastern time. The Eastern States Office closes at 4:00 p.m. eastern time, which means that appellant allowed only one hour and fifty-five minutes for the money order to be transmitted to Silver Spring, Maryland, and physically delivered to the Eastern States Office. It was received in the Western Union office in Silver Spring at 3:00 p.m. E.T., and was delivered by messenger to the Eastern States Office at 4:05 p.m., after the office was closed. Nevertheless, the messenger apparently found a Bureau employee still on the premises who received the telegram and signed the messenger's receipt. The Bureau employee is a cadastral engineer whose duties do not normally involve

the administration of oil and gas leases or the receipt of payments. He apparently handled it properly, so that it was noted as received as of 10 a.m. on the following day, June 4, in accordance with the pertinent Departmental regulation, 43 CFR 1821.2-2. Thus, the lease terminated automatically.

[2] There can be no gainsaying the fact that Harvey was dilatory in initiating his effort to pay the lease rental. He did not transmit the payment from Dallas until the afternoon of June 3, although the anniversary date was June 1. While it is true that the statute and regulation provide that when the anniversary date falls on a holiday or weekend, as in this case, the payment may be considered timely if it is received on the next working day, the obvious purpose of these provisions is to prevent the termination of leases when the payment is timely but the office is not open to receive it. The provision was not intended to allow a lessee to withhold payment beyond the anniversary date by affording one, two or three extra days in which to initiate the transmittal, although lessees often take advantage of the provision for that purpose. One who does so, however, and who fails to have the payment delivered on time, may not assert that he exercised due diligence, or that the delay was justified.

In this case appellant allowed only one hour and fifty-five minutes to have the payment transmitted from Dallas to Silver Spring and then delivered to the proper office. The fact that it arrived only five minutes after the office had closed is attributable to the expeditious service afforded by the telegraph company rather than to the diligence of the lessee, who certainly failed to send it "sufficiently in advance of the anniversary date to account for normal delays in the collection, transmittal and delivery of the payment," as required by 43 CFR 3108.2-1.

This case is closely akin to William C. McCullough, 18 IBLA 97 (1974), in which the lessee waited until the due date before telegraphing his lease payment to the Bureau's Wyoming State Office in Cheyenne. It was received by the Cheyenne telegraph office at 4:16 p.m., one minute after the Bureau office had closed, and was not delivered until the next day. This Board held in that case that the lessee had not exercised due diligence.

[3] [4] In the instant case Harvey also alleges that because of attending to his wife's serious illness in March and April, 1974, and because he himself was not well, he could not make the payment by June 3. This, too, is very similar to one of the allegations made in the McCullough appeal, supra. However, as in McCullough, we find that his wife's illness is not proximate in time to the due date, and therefore, is not relevant to this case. See Louis Samuels, 8 IBLA 268 (1972). With respect to the assertion that he

himself was "not well," appellant has not shown the nature or seriousness of the illness, nor, consequently, why that illness would cause him to make his payment late. Since the burden is on appellant to show that his late payment was justifiable, 43 CFR 3108.2-1(c)(2), we must hold that he had failed. 1/

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Edward W. Stuebing
Administrative Judge

I concur:

Newton Frishberg
Chief Administrative Judge

1/ In his brief appellant stated that he would send corroborating evidence of his illness within a week. It has been more than five months and we have received nothing.

ADMINISTRATIVE JUDGE LEWIS DISSENTING:

I disagree with the majority, which finds the payment of rental untimely and that the lease terminated by operation of law.

An inquiry was made of Western Union to determine the time it usually takes for money to be sent by wire from Dallas, Texas, to the Eastern States Office at Silver Spring, Maryland. The answer was "two hours." At that time we were also advised that the money order in the instant case was sent from the Dallas, Texas, Western Union office at 1:05 p.m. Central Time on June 3, 1974; that it was received by Western Union in Silver Spring, Maryland, at 3:15 p.m. Eastern Time, June 3, 1974, and that it was delivered by messenger service to the Eastern States Office in Silver Spring on June 3 at 4:05 p.m., where it was accepted and signed for by Bouman (Lane Bouman), an employee.

It is clear that the proper office for the rental herein to be paid was the Eastern States Office at Silver Spring, Maryland, and that it should have been received by 4 p.m. on June 3 to be timely paid. As it was in fact received at 4:05 that day and was accepted and signed for by an employee, I would find the rental was in fact paid on June 3. I would find that appellant has accomplished 99 and 9/10ths compliance with the time requirements for paying the rental. As he has a property right in the lease, under the circumstances of so nearly complete compliance with the applicable regulations, I could not find non-payment of rental, which would mean automatic cancellation of the lease by operation of law.

In sum, I would find the rental timely paid and that the lease is still in effect.

I further note, assuming arguendo, that the payment was untimely, that the illness of the appellant and/or of his wife, must be shown to have a causal connection with the time of payment of the rental for the late payment to be found justifiable. If late payment is found justifiable, a lease automatically terminated by operation of law may be reinstated.

Anne Poindexter Lewis
Administrative Judge

